(2)

No. 06-888

Supreme Court, U.S.
FILED
FEB 5 - 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CORAL POWER, L.L.C., ET AL.,

Petitioners,

v.

STATE OF CALIFORNIA EX REL.
EDMUND G. BROWN JR., ATTORNEY GENERAL, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

EDMUND G BROWN JR.
Attorney General of the
State of California
TOM GREENE
Chief Assistant Attorney General
MANUEL MEDEIROS
State Solicitor General
MARK BRECKLER
Senior Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
KENNETH P. ALEX
Supervising Deputy Attorney General
PAUL STEIN
Deputy Attorney General
(Counsel of Record)
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5740
Fax: (415) 703-5480
Counsel for Respondent State of California ex rel. Edmund G. Brown Jr., Attorney General

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission has the power to order retroactive refunds where a public utility violates both Section 205 of the Federal Power Act, 16 U.S.C. § 824d, and a condition of its "market-based rate tariff" by failing to report transaction-specific data specifying the rates it charged individual buyers.

2. Whether a tariff which contains no ascertainable rates, just a statement that rates will be determined "by agreement," coupled with post-performance reporting of the rates charged, produces valid filed rates under the Federal Power Act and this Court's decisions in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

LIST OF PARTIES

The California Attorney General incorporates by reference the list of parties in the petition, except he notes that neither the California Public Utilities Commission nor Williams Energy Marketing & Trading Co. should be listed as a respondent because they were not granted intervenor status in the Ninth Circuit. Rule 14.1.(b). The California Attorney General further notes that TransAlta Energy Marketing (California) Inc. and TransAlta Energy Marketing (U.S.) Inc. intervened in the Ninth Circuit and should therefore be listed as respondents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
INTRODUCTION	1
STATEMENT	2
A. Regulatory Framework	2
B. The Market-Based Rate Regime	5
C. FERC's Decisions	6
D. The Ninth Circuit's Remand	9
REASONS WHY THE PETITION SHOULD BE DENIED	12
A. The Decision Below Rests On FERC's Well-Established Authority To Order Refunds On Past Sales In The Face Of Section 205 Violations	12
B. Petitioners Did Not Properly File Their Rates Under Any Theory; Therefore, The Judgment Is Valid Regardless Of The Reasons Given By The Ninth Circuit	19
C. Petitioners Fail To Show Any Exigency Requiring Intervention By This Court	21
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 3, 4, 13, 20

Aron v. Penn. R. Co., 80 F.2d 100 (2d Cir. 1935) 14

AT&T v. Central Office Tel., Inc., 524 U.S. 214 (1998) 13

Atlantic Refining Co. v. Pub. Serv. Comm'n, 360 U.S. 378 (1959) 7

Boston Edison Co. v. FERC, 856 F.2d 361 (1st Cir. 1988) 4, 5, 14

City of Girard, Kansas v. FERC, 790 F.2d 919 (D.C. Cir. 1986) 6

Consolidated Edison Co. of New York v. FERC, 347 F.3d 964 (D.C. Cir. 2003) 14

Consolidated Gas Transmission Corp. v. FERC, 771 F.2d 1536 (D.C. Cir. 1985) 14

East Tenn. Natural Gas Co. v. FERC, 631 F.2d 794 (D.C. Cir. 1980) 14

Electrical Dist. No. 1. v. FERC, 774 F.2d 490 (D.C. Cir. 1985) 20

In re Olympia Holding Corp. v. Frito-Lay, Inc., 88 F.3d 952 (11th Cir. 1996) 13

Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94 (1915) 13

Maislin Industries U.S., Inc. v. Primary Steel, Inc., 497 U.S. 197 (1990) 11, 13, 17, 20, 21

MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218 (1994) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Comm'n, 341 U.S. 246 (1951) 13

Pub. Util. Comm'n v. FERC, 462 F.3d 1027 (9th Cir. 2006) 8, 14

Pub. Util. Comm'n v. FERC, Nos. 03-74207 & 03-74246, 2006 WL 3717673 (9th Cir. Dec. 19, 2006) 22

Pub. Util. Dist. No. 1 v. FERC, Nos. 03-72511 et al., 2006 WL 3717533 (9th Cir. Dec. 19, 2006) 14, 22

Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986) 20

Security Services, Inc. v. K Mart Corp., 511 U.S. 431 (1994) 4, 13, 15, 19

Southern Cal. Edison Co. v. FERC, 805 F.2d 1068 (D.C. Cir. 1986) 14

Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995) 20

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 13

Towns of Concord, Norwood, and Wellesley, Massachusetts v. FERC, 955 F.2d 67 (D.C. Cir. 1992) 4, 14

Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651 (3d Cir. 2003) 14

ADMINISTRATIVE DECISIONS

British Columbia Power Exchange Corp., 80 FERC ¶ 61,343 (1997) 6

Carolina Power & Light Co., 17 FERC ¶ 61,118 (1981) 14

TABLE OF AUTHORITIES – Continued

Page

Cities and Villages of Albany and Hanover, Ill. et al., 61 FERC ¶ 61,037 (1991) 15

Delmarva Power & Light Co., 24 FERC ¶ 61,199 (1983) 12, 17

El Segundo Power, L.L.C., 82 FERC ¶ 61,126 (1998) 5

Electric Cooperatives of Kansas, 14 FERC ¶ 61,176 (1980) 14

Enron Power Marketing, Inc., 65 FERC ¶ 61,305 (1993) 5, 11

Louisville Gas & Elec. Co., 68 FERC ¶ 61,246 (1994) 6, 11

Morgan Stanley Capital Group, Inc. 69 FERC ¶ 61,175 (1994) 5, 11

Pub. Serv. Co. of New Hampshire, 1 FERC ¶ 63,039 (1977) 14

Reporting Requirements and Fees Applicable to Power Marketers, 80 FERC ¶ 61,373 (1997) 11

San Diego Gas & Elec. Co., 115 FERC ¶ 61,230 (2006) 23

San Diego Gas & Elec. Co., 113 FERC ¶ 61,308 (2005) 23

San Diego Gas & Elec. Co., 113 FERC ¶ 61,235 (2005) 23

San Diego Gas & Elec. Co., 113 FERC ¶ 61,171 (2005) 23

San Diego Gas & Elec. Co., 111 FERC ¶ 61,017 (2004) 23

TABLE OF AUTHORITIES – Continued

Page

San Diego Gas & Elec. Co., 109 FERC ¶ 61,257 (2004) 24

Southern Co. Services, Inc., 75 FERC ¶ 61,130 (1996) 6, 11

The Washington Water Power Co., 83 FERC ¶ 61,097 (1998) 12, 17

STATUTES AND REGULATIONS

16 United States Code

§ 824d(a) 1, 2

§ 824d(c) 1, 2, 20, 21

§ 824d(d) 1, 2, 20, 21

§ 824d(e) 3, 11, 21

§ 824e 3, 11

§ 824e(a) 3

§ 824e(b) 3

§ 825h 14

18 Code of Federal Regulations

§ 385.206 9

FERC Stats. and Reg. Preambles ¶ 31,127 (2002) 6

OTHER MATERIALS

Application of El Segundo Power, L.L.C. for Market-Based Rates, FERC Docket No. 98-1127, filed Dec. 17, 1997 5

California Energy Commission, *Energy Facility Status*, updated Jan. 8, 2007 23

TABLE OF AUTHORITIES – Continued

Page

Final Report on Price Manipulation in Western Markets, FERC Docket No. PA02-2, March 26, 2003 8

Joint Offer of Settlement, FERC Docket No. EL00-95, filed Aug. 9, 2006 24

Paul Joskow and Edward Kahn, *A Quantitative Analysis of Pricing Behavior in California's Wholesale Electricity Market During Summer 2000: The Final Word*, Feb. 4, 2002 7

Letter from Lisa J. Evans, Mediator, Ninth Circuit Court of Appeals, dated Jan. 25, 2007 24

Richard Stavros, *Lost in Translation*, PUBLIC UTILITIES FORTNIGHTLY, June 1, 2004 20

BRIEF FOR RESPONDENT IN OPPOSITION

The State of California *ex rel.* Edmund G. Brown Jr., Attorney General, respectfully submits this brief in opposition to the petition for a writ of certiorari to the Ninth Circuit Court of Appeals filed by Coral Power, L.L.C., et al.

INTRODUCTION

Petitioners distort the holding of the Ninth Circuit so as to create the appearance of a conflict with the Federal Power Act ("FPA") and decisions of this Court and the circuit courts regarding the "filed rate doctrine." There is no conflict.

Contrary to petitioners' claims, the Ninth Circuit did not hold that Section 205 of the FPA, 16 U.S.C. § 824d, gives FERC authority to order retroactive refunds on properly filed rates. It held that (1) petitioners and other sellers violated FPA Section 205 and a condition of their market-based rate tariffs by failing to report the rates they charged to FERC, and (2) as a result of those violations, they did not properly file their rates and cannot invoke the filed rate doctrine as a bar to refund claims. FERC's authority to order refunds on past sales in the face of Section 205 violations is well-established.

Even if petitioners were correct about the holding, the judgment would still be valid on alternate grounds. The filed rate doctrine does not apply in this case because petitioners did not properly file their rates under any theory. The FPA and numerous decisions of this Court and the circuit courts make it eminently clear that a market-based rate tariff, which contains no rates at all, is not entitled to traditional, "filed rate" protections from refund

claims, whether or not utilities report their transaction data to FERC after-the-fact.[1] Thus, the court's remand to FERC was the correct result, regardless of the reasons given by the Ninth Circuit.

Finally, petitioners fail to show any exigency requiring intervention by this Court. Petitioners offer no evidence, just overheated speculation, about the decision's impact on the nation's power markets. Although the decision was issued more than two years ago, petitioners cite no evidence that it has caused, or will cause, any adverse commercial or regulatory consequences. The petition should be denied.

STATEMENT

A. Regulatory Framework

This case involves the scheme of regulation established by Congress for ensuring "just and reasonable" rates for wholesale electricity. 16 U.S.C. § 824d(a). FPA Section 205(c) provides in part that utilities must file "*schedules showing all rates and charges for any transmission or sale* subject to the jurisdiction of the Commission . . . together with all contracts which in any manner affect or relate to such rates. . . ." 16 U.S.C. § 824d(c) (emphasis added).

Section 205(d), 16 U.S.C. § 824d(d), requires utilities to give notice of any proposed rate changes. Utilities must file "new schedules stating plainly the change or changes

[1] The California Attorney General is filing, concurrent with this opposition, a conditional cross-petition under Rule 12.5 addressing this issue.

to be made," and no change "shall be made . . . except after sixty days' notice to the Commission and to the public." *Id.*

Once notice has been given, FPA Section 205(e) authorizes FERC to "suspend" and thereby "defer the use" of a proposed rate for up to five months pending an investigation "concerning the lawfulness of such rate, charge, or classification. . . ." 16 U.S.C. § 824d(e). If no decision has been rendered by that point, the proposed rate "shall go into effect. . . ." *Id.* But, in the case of proposed rate increases, FERC may order the utility to "keep accurate account in detail of all amounts received by reason of such increase," and "upon completion of the hearing and decision may by further order require such public utility . . . to refund, with interest . . . such portion of such increased rates or charges as by its decision shall be found not justified." *Id.*

Section 206, 16 U.S.C. § 824e, authorizes FERC or complainants to seek changes in existing rates. Section 206 provides in pertinent part that if FERC finds, "after a hearing," that an existing rate is "unjust, unreasonable, unduly discriminatory or preferential, [FERC] shall determine the just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a).

Read together, FPA sections 205 and 206 form the basis of the filed rate doctrine and its corollary, the rule against retroactive ratemaking. As petitioners explain, the filed rate doctrine serves two key purposes in this context: (1) it requires public utilities to charge, and buyers to pay, the "filed rate," and (2) it bars FERC from ordering retroactive refunds on the grounds that a utility's filed rate, seen in hindsight, is not "just and reasonable." *See Arkansas*

Louisiana Gas Co. v. Hall ("Arkla"), 453 U.S. 571, 577-78 (1981);[2] *see also* 16 U.S.C. § 824e(b).

As discussed in more detail below, however, this Court has always recognized that the filed rate doctrine only applies if rates were "properly filed" in the first instance. *Arkla*, 453 U.S. at 577. An unfiled tariff, or a tariff that fails to give sufficient notice of rates, does not produce a filed rate that binds buyers and sellers. *Security Services, Inc. v. K Mart Corp.*, 511 U.S. 431, 440-43 (1994).

Further, courts have consistently held that FERC's authority includes the power to order retroactive refunds where a utility either fails to file its rates in the first instance or violates the terms and conditions of a filed tariff, i.e., fails to charge its "filed rate." *E.g., Towns of Concord, Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (authorizing retroactive refunds on the grounds that a utility imposed "charges not in conformity with its rate schedules"); *Boston Edison Co. v. FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (holding that FERC can "enforce the terms of a filed rate and order refunds for past violations of one").

Courts have cited FPA sections 205, 206, and 309, 16 U.S.C. § 825h, as the sources of FERC's authority to order refunds as a remedy for past violations of the filing requirement and/or a tariff. *Towns of Concord*, 955 F.2d at 72-73; *see also id.* at 73 (canvassing similar grants of

---

[2] *Arkla* involved the cognate provisions of the Natural Gas Act ("NGA"). Like the petition, this brief in opposition follows the Court's "established practice of citing interchangeably decisions interpreting the pertinent sections" of the NGA and the FPA. *Arkla*, 453 U.S. at 577 n.7.

authority to other administrative agencies); *Boston Edison,* 856 F.2d at 369-70.

B. The Market-Based Rate Regime

In the market-based rate system at issue here, FERC does not require utilities to file their "rates," i.e., prices, before service commences. Instead, FERC reviews applications for "market-based rate authority." If FERC decides that a supplier lacks market power, or has adequately mitigated its market power, it accepts an open-ended, "umbrella" tariff which contains no rates, just a statement that rates will be determined "by agreement" between buyer and seller. *See, e.g., Application of El Segundo Power, L.L.C. for Market-Based Rates*, FERC Docket No. 98-1127, filed Dec. 17, 1997, Exh. A [Proposed Rate Schedule No. 1].[3]

In addition to the tariff, FERC requires suppliers with market-based rate authority to provide, on a quarterly basis, detailed information regarding all their sales and purchases, including the rates they charged. FERC has said that post-transaction, quarterly reporting of rates is necessary to ensure that all rates are on file as required by Section 205, to ensure the supplier's rates are just and reasonable, and to monitor the supplier's ability to exercise market power. *E.g., Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305, at p. 62,406 (1993), *rehearing denied,* 66 FERC ¶ 61,244 (1994); *Morgan Stanley Capital Group, Inc.*, 69 FERC ¶ 61,175, at p. 61,696 (1994).

---

[3] FERC approved the proposed tariff in *El Segundo Power, L.L.C.*, 82 FERC ¶ 61,126 (1998).

FERC has further held that suppliers must report their rates on a transaction-specific basis. Each and every sale must be reported, including each sale of power into centralized auction markets operated by the California Power Exchange ("Cal. PX") and the California Independent System Operator ("Cal. ISO"). FERC Stats. and Reg. Preambles ¶ 31,127 at 30,154 (2002) (CCH); *see City of Girard, Kansas v. FERC*, 790 F.2d 919, 922 (D.C. Cir. 1986) (holding that FERC's "jurisdiction over rates encompasses review of *each* rate charged to *each* customer") (emphasis in original).

FERC imposed these reporting requirements on the petitioners and other sellers at the time they sought and obtained market-based rate authority. *E.g., British Columbia Power Exchange Corp.*, 80 FERC ¶ 61,343, at p. 62,141 (1997). FERC's tariff-approval orders contained a standard requirement that transaction-specific detail on all sales be reported no later than 30 days after the end of each calendar quarter. *Louisville Gas & Elec. Co.*, 68 FERC ¶ 61,246, at p. 61,124 (1994); *Southern Co. Services, Inc.*, 75 FERC ¶ 61,130, at p. 61,444 (1996).[4]

C. FERC's Decisions

In the proceedings below, the California Attorney General alleged, *inter alia*, that petitioners and other sellers failed to report transaction-specific information on any of their sales into centralized auction markets administered by the Cal. PX and Cal. ISO during the California

---

[4] Petitioners seem to suggest that FERC required some, but not all of them, to report transaction-specific data. Petition at 7. FERC rejected such claims. Pet. App. at 48a-50a.

energy crisis. Sellers provided only highly aggregated information, which made it impossible to determine the date, duration, quantity, or price of any single sale among the tens of thousands that petitioners and others executed. Complaint of the State of California *ex rel.* Bill Lockyer, Attorney General ("AG Complaint"), FERC Docket No. EL02-71, filed March 19, 2002, pp. 18-23. Petitioners' reports were useless for their intended purpose, which was to facilitate review of rates at a transaction-specific level.

As a result, during the worst power crisis in the nation's history, the federal agency charged with exclusive jurisdiction to regulate wholesale rates, 16 U.S.C. § 824(a), and with providing a "complete, permanent, and effective bond of protection for consumers," *Atlantic Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 389-90 (1959), lacked the fundamental data required to effectively regulate in the public interest. When FERC opened an investigation into market manipulation claims, nearly two years after the crisis began, FERC staff reviewed the sellers' quarterly reports and determined that they provided no useful information. *See* Notice to All Jurisdictional Sellers and Non-Jurisdictional Sellers in the West, FERC Docket No. PA-02-000, March 5, 2002.[5]

[5] Market manipulation and market power wielded by power suppliers have been identified as the primary causes of the energy crisis. Leading energy economists, including those cited by petitioners, have concluded that hot weather and other "market fundamentals" do not explain the historically high prices charged from May 2000-June 2001 in California and throughout the western United States. *See* Paul Joskow and Edward Kahn, *A Quantitative Analysis of Pricing Behavior in California's Wholesale Electricity Market During Summer 2000: The Final Word*, Feb. 4, 2002, at 33 (concluding that "there is a very significant gap between actual market prices and competitive benchmark prices that take account of these market fundamentals"); *see also*

(Continued on following page)

In response to the California Attorney General's complaint, FERC held that petitioners and other sellers committed "serious" violations by failing to report transaction-specific detail about their California sales. Pet. App. at 53a.[6] FERC further held, however, that petitioners' reporting violations were technical in nature and did not amount to a defect in the "filed rate" itself.

FERC held that petitioners' market-based rate tariffs, which stated that rates would be determined "by agreement," were lawful filed rates, *id.* at 52a-53a, and that post-performance reporting serves the more limited purpose of facilitating market oversight and monitoring. *Id.* at 48a; *see also id.* at 42a (holding that "[a]fter-the-fact, quarterly reports provide a means for spotting pricing

---

Final Report on Price Manipulation in Western Markets, FERC Docket No. PA02-2, March 26, 2003, at ES-1 (detailing manipulation of natural gas prices, which "facilitat[ed] the unprecedented price increase in the electricity market").

Further, California and other complainants presented evidence implicating numerous sellers in a variety of schemes to manipulate the market and/or exercise market power in order to drive up prices. *See, e.g.*, Rebuttal Testimony of Peter Fox-Penner, Exh. CA-349, FERC Docket Nos. EL00-95-000 et al., filed March 20, 2003. Claims alleging market misconduct by various sellers were recently remanded to FERC for further consideration. *Pub. Util. Comm'n v. FERC*, 462 F.3d 1027, 1049 (9th Cir. 2006) (holding that California purchasers presented "significant evidence" of market misconduct).

[6] Petitioners state that quarterly reporting "included, among other things, information on the participants in the transactions, and the price at which power was sold. FERC used that information to reassess its conclusion that the seller lacked, or had mitigated market power." Petition at 7. In reality, sellers did *not* report "the price at which power was sold" in any given transaction. And because sellers did not report such information, FERC could not have "used" it for any purpose.

trends, discriminatory patterns, or other indicia of the exercise of market power").

According to FERC, because petitioners' rates were lawfully filed, "[u]nder Section 206 of the FPA, the Commission currently can institute a refund proceeding only for the refund effective period, which can begin no sooner than 60 days from the date of the Attorney General's March 16, 2002 complaint." *Id.* at 52a; *see also id.* at 53a (holding that "section 206 bars retroactive refunds in this proceeding, or in the EL00-95 proceeding").[7] FERC acknowledged its authority to order retroactive relief where utilities "violate rules in applicable rate tariffs," *id.* at 76a, but concluded that no such relief was available in this case. *Id.*; *see also id.* at 75a.

D. The Ninth Circuit's Remand

The Ninth Circuit rejected the California Attorney General's argument that FERC's filing requirements for market-based rates violate the FPA *per se*. Pet. App. at 10a-12a. But it reversed FERC's determinations that (1) quarterly reporting violations were irrelevant to whether petitioners charged lawful filed rates during the energy crisis, and (2) Section 206 barred FERC from ordering

---

[7] The California Attorney General filed this case, not under Section 206 of the FPA, but under Rule 206 of FERC's Rules of Practice and Procedure, 18 C.F.R. § 385.206(a), which provides that "Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction." The California Attorney General's complaint sought refunds for alleged violations of Section 205, not refunds under Section 206. AG Complaint at 2, 24-25.

refunds on sales that occurred prior to the filing of the California Attorney General's complaint.

The Ninth Circuit held that post-transaction, quarterly reporting is "essential to a valid administration of the market-based system," Pet. App. at 18a, and is an "integral part" of a supplier's filed rate. *Id.* at 15a; *see also id.* at 14a, 16a, 17a, and 18a. It held, in sum, that a valid rate filing in the context of market-based rates necessarily consists of two distinct parts: (1) the seller's grant of market-based rate authority, memorialized in a tariff stating that rates will be determined "by agreement," and (2) post-transaction reporting of the rates charged. The court further held that utilities must comply with both halves of this "dual requirement," *id.* at 11a, in order to satisfy the statutory command that all rates be filed and posted for public inspection under Section 205.

The court gave several reasons why this must be the case. First, without post-transaction reporting, FERC has no way of knowing whether rates being charged in the market are just and reasonable, and whether competitive market forces are "truly determining the price" of wholesale power. *Id.* at 12a. FERC's prior determination that a seller lacks market power is not sufficient in this regard because it "may bear little or no relation to the realities of subsequent circumstances." *Id.* at 17a.

Second, FERC cannot limit its review of proposed rates to deciding whether a seller lacks market power (a determination that could take place several years before the consummation of any given transaction) because this Court outlawed the same regulatory approach in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218

(1994), and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 197 (1990). *Id.* at 15a-16a; *see also id.* at 11a. The Ninth Circuit explained that without post-transaction reporting, "effective federal regulation is removed altogether." *Id.* at 15a; *see also id.* (holding that "[w]ithout the required filings, neither FERC nor any affected party may challenge the rate").

Third, the court held that FPA Section 205(e) is "practically speaking, eliminated under the scheme as FERC would have us interpret it." *Id.* at 18a. If the filed rate consisted solely of a market-based rate tariff, utilities could make any number of sales to individual buyers at widely varying prices, but the filed rate would never vary, precluding any opportunity to challenge the legality of any particular rate under Section 205(e). 16 U.S.C. § 824d(e). Any challenges would have to be brought under FPA Section 206, 16 U.S.C. § 824e, in which "the only remedies are prospective, and, for that matter, unavailable for a period of 60 days pursuant to § 206(b) . . . Such an interpretation comports neither with the statutory text nor with the Act's 'primary purpose' of protecting consumers." Pet. App. at 18a; *see infra* n.12.

Finally, the court rejected FERC's (and petitioners') conception of the filed rate in this case because it contradicted other pronouncements by FERC on the subject. *Id.* at 12a. FERC repeatedly held elsewhere that quarterly reporting is "necessary" to ensure compliance with Section 205. *Id.* (citing *Enron Power Marketing*, 65 FERC ¶ 61,305 (1993)); *see also, e.g.*, *Louisville Gas & Elec. Co.*, 68 FERC ¶ 61,247, at p. 62,124 (1994); *Southern Co. Services, Inc.*, 75 FERC ¶ 61,130 (1996); *Morgan Stanley Capital Group, Inc.*, 72 FERC ¶ 61,082 (1995); *Reporting Requirements*

and Fees Applicable to Power Marketers, 80 FERC ¶ 61,373 (1997).

The court further held that FERC possesses "broad remedial authority" to order refunds or other monetary remedies on the grounds that sellers violated the dual requirement for filing their market-based rates under Section 205. *Id.* at 14a. The Ninth Circuit explained that FERC "possesses authority to impose retroactive refunds for § 205 violations," Pet. App. at 18a, and that this case cannot be meaningfully distinguished from previous cases in which FERC ordered utilities to pay refunds on past sales on the grounds that they had "violated § 205, either by violating the terms of an accepted rate, or by charging rates without first seeking approval under FPA § 205." *Id.* at 14a-15a and 18a (citing *Delmarva Power & Light Co.*, 24 FERC ¶61,199 (1983); *The Washington Water Power Co.*, 83 FERC ¶ 61,097 (1998)).

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Decision Below Rests On Ferc's Well-Established Authority To Order Refunds On Past Sales In The Face Of Section 205 Violations.

The Ninth Circuit held that petitioners and other sellers violated both Section 205 and a condition of their market-based rate tariffs by failing to report the rates they charged during the energy crisis. FERC's authority to remedy such violations by ordering retroactive refunds is well-established. Far from posing any conflict, the Ninth Circuit's holding that refunds are available comports fully with the text and legislative history of the FPA, this

Court's decisions, and decisions of the circuit courts, including the D.C. Circuit.

1. As noted previously, the filed rate doctrine only protects "properly filed" rates. *Arkla*, 453 U.S. at 577; *see also Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986) (holding that the filed rate doctrine protects "duly submitted, lawful rates"). The filed rate doctrine is "not even implicated" in the absence of properly filed rates. *Square D,* 409 U.S. at 422 n.29.[8]

This Court has further held that a properly filed rate must give sufficient notice of the rate to be charged, or at a minimum support a "reliable calculation of charges." *Security Services*, 511 U.S. at 443; *see also Maislin*, 497 U.S. at 126 (the purpose of rate filings is to render rates "definite and certain"). If a utility failed to file its rate in the first instance, or its filed tariff is missing an "essential element," such that the tariff fails to give adequate notice of the rate to be charged, the filed rate doctrine does not apply. *Security Services*, 511 U.S. at 440-43; *see, e.g., In re Olympia Holding Corp. v. Frito-Lay, Inc.*, 88 F.3d 952, 961 (11th Cir. 1996).

---

[8] This has been the law since at least *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), in which the Court held that only a "duly filed" rate binds buyers and sellers. *See also, e.g., AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 230 (1998) (Rehnquist, C.J., concurring) (filed rate doctrine only bars challenges to "the rate that respondents had filed in their tariff"); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Comm'n*, 341 U.S. 246, 258 (1951) (Frankfurter, J., dissenting) ("Congress did not intend either court or Commission to have the power to award reparations on the ground that a *properly* filed rate or charge has in fact been unreasonably high or low. . . .") (emphasis added).

Further, where a utility violates Section 205, either by failing to file its rate or violating the terms and conditions of its filed rate, FERC has ample authority to order refunds, that is, to make sellers return the difference between the rate that was charged and a just and reasonable rate. *Towns of Concord,* 955 F.2d at 72-73; *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 972-73 (D.C. Cir. 2003); *Southern Cal. Edison Co. v. FERC*, 805 F.2d 1068, 1070-72 (D.C. Cir. 1986); *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1551 (D. C. Cir. 1985); *East Tenn. Natural Gas Co. v. FERC*, 631 F.2d 794, 798-800 (D.C. Cir. 1980); *Pub. Util. Comm'n v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006); *see also, e.g., Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 656 (3d Cir. 2003); *Aron v. Penn. R. Co.*, 80 F.2d 100, 102 (2d Cir. 1935).

The circuit courts have held that Section 309 of the FPA, 16 U.S.C. § 825h, read in conjunction with Sections 205 and 206, gives FERC this power. *E.g., Towns of Concord* at 72-73; *Boston Edison*, 856 F.2d at 369-70; *Pub. Util. Comm'n*, 462 F.3d at 1045. Section 309 expressly authorizes FERC to "perform any and all such acts . . . as it may find necessary or appropriate to carry out the provisions of the [FPA]," 16 U.S.C. § 825h, including the statutory requirements that utilities file their rates in tariffs, and adhere to the terms and conditions of their filed tariffs.

FERC has exercised its authority to order retroactive relief for Section 205 violations on numerous occasions. *E.g., Carolina Power & Light Co.*, 17 FERC ¶ 61,118, at p. 61,237 (1981); *Electric Cooperatives of Kansas*, 14 FERC ¶ 61,176, at p. 61,230 (1980); *Pub. Serv. Co. of New Hampshire*, 1 FERC ¶ 63,039, at p. 65,294 (1977). FERC has said it cannot even "conceive of a reasonable basis" for

preventing it from ordering retroactive relief to remedy violations of a filed tariff. *Cities and Villages of Albany and Hanover, Ill. et al.*, 61 FERC ¶ 61,037, at p. 61,186 (1991) (citing *North Carolina Elec. Membership Corp. et al. v. Carolina Power & Light Co.*, 57 FERC ¶ 61,332, at p. 62,065 (1991). Indeed, if FERC had no power to order refunds in the face of Section 205 violations, the filing requirement, which is the "essential characteristic of a rate regulated industry," *MCI*, 512 U.S. at 231, would be largely unenforceable.

The Ninth Circuit held here that an "integral part" of petitioners' tariffs, i.e., the rates themselves, were missing due to reporting violations. Pet. App. at 14a, 15a, 16a, and 17a; *see Security Services*, 511 U.S. at 440 (holding a filed tariff invalid on the grounds that it lacked an "essential element," making it impossible to determine the applicable rate). The Ninth Circuit further held that, "[p]ragmatically, under such circumstances, there is no filed tariff in place at all." Pet. App. at 15a; *see Security Services*, 511 U.S. at 440 (holding that "in effect [the carrier] had no rates on file" because its tariff did not disclose the applicable rate).

Thus, the Ninth Circuit's remand to FERC for "refund proceedings," Pet. App. at 2a, poses no conflict with the FPA or any decision of this Court or the circuit courts. The court simply concluded that FERC has the power to order refunds on rates that were not properly filed due to reporting violations, and there is nothing "pernicious," Petition at 27, about that. Indeed, petitioners do *not* dispute FERC's authority to order retroactive refunds where

utilities violate Section 205 or the terms and conditions of a filed tariff. *See* Petition at 19 n.33.[9]

In sum, far from "ignoring" the filed rate doctrine, Petition at 2, the Ninth Circuit sought to promote the doctrine's purposes by reminding FERC of its authority to remedy widespread and "egregious" violations of the filing requirement, Pet. App. at 15a, which was "Congress's chosen means of preventing unreasonableness and discrimination in rates." *MCI*, 512 U.S. at 230.

2. Petitioners misstate the Ninth Circuit's holding to create the appearance of a conflict where none exists. The court did *not* hold that the filed rate doctrine applied despite sellers' reporting violations. Petition at 23-24 n.39. Rather, the court held that the market-based rate system does not violate the FPA *"per se," id.* at 12a, and that it produces properly filed rates if, and only if, sellers report their transaction data to FERC, and FERC treats those reports as an integral part of the filed rate. Because petitioners only complied with one half of the dual requirement

[9] Contrary to petitioners' claim, Congress did not "[decline] to amend the FPA to create the very refund authority" that the Ninth Circuit invoked. Petition at 21. Congress rejected an amendment that would have permitted an earlier "refund effective date" in future complaint proceedings under Section 206 of the FPA. *See* Petition at 21. That has no bearing on the Ninth Circuit's holding that FERC has the power to order retroactive refunds for petitioners' violations of Section 205 and of a critically important condition of their tariffs in this case. Congress was presumably aware of the Ninth Circuit's decision (which was issued September 9, 2004), but did nothing to cast any doubt on its validity.

for filing their market-based rates, they violated Section 205 and cannot invoke the filed rate doctrine.[10]

Petitioners have explained the court's holding in just that way elsewhere. In their request for rehearing or rehearing *en banc* in the Ninth Circuit, petitioners argued that the panel erred by "linking quarterly, post-transaction filings to the determination of whether there is a 'filed tariff in place,'" and "signal[ing] that pre-authorized MBR sales that were misreported *lack filed rate protection*."

---

[10] The court made the basis of its holding clear by stating, *inter alia*, that "[p]ragmatically, under such circumstances, there is no filed tariff in place at all." *Id.* at 15a. Without quarterly reporting, petitioners' tariffs failed to "pass legal muster." *Id.*; *see also id.* at 13a (holding that the "very mechanism that distinguished [petitioners'] tariffs from those prohibited by the Supreme Court in *MCI* and *Maislin* was, for all practical purposes, non-existent."

More specifically, the court held that the lack of sufficiently detailed reporting "undermined" the filed rate doctrine by making it "impossible to review the reasonableness of privately negotiated, unfiled rates." *Id.* at 15a. Similarly, it held that reporting violations made it impossible for either FERC or the public to "challenge the rate[s]" charged by petitioners. *Id.*

In addition to making clear that petitioners charged "unfiled rates," Pet. App. at 15a, the Court held that FERC has authority to order refunds on past sales for "§ 205 violations," *id.* at 18a, and that FERC's decisions in *Washington Water Power* and *Delmarva* control here. *Id.* at 14a-15a, 18a. In *Washington Water Power*, FERC ordered retroactive relief where a utility and an affiliated power marketer violated a condition of FERC's order granting market-based rate authority that was deemed essential to ensure the reasonableness of rates. 83 FERC ¶ 61,097, at p. 61,464 (Show Cause Order); 83 FERC ¶ 61,282, at p. 62,169 (1998) (Order on Responses to Show Cause Order). In *Delmarva*, FERC ordered retroactive relief where a utility imposed certain costs on customers without making the required filing under Section 205. 24 FERC ¶ 64,199, at p. 61,461, *rehearing denied*, 24 FERC ¶ 61,380 (1983). FERC held there that failing to order refunds would allow utilities to "flout our regulations, and overcharge consumers with impunity." 24 FERC, at p. 61,461.

Petition for Rehearing and Suggestion for Rehearing En Banc of Indicated Intervenors, filed Oct. 25, 2004, p. 19 (emphasis added). They further argued that the panel "misapprehends the distinction between the function of an MBR tariff, which is the filed rate under section 205(c), 16 U.S.C. § 824d(c), and the function of quarterly reports as a method of monitoring rates." *Id.* at 8.[11] Thus, petitioners clearly understand that, under the Ninth Circuit's holding, the filed rate doctrine does not apply in the absence of sufficiently detailed, post-performance reporting, and their belated claims to the contrary should be disregarded.

Petitioners argue that the court could not have based its holding on a finding that sellers violated Section 205 and a condition of their tariffs because it did not expressly cite Section 309 as the source of FERC's authority to order refunds. Petition at 19 n.33. This logic fails. The court plainly held that FERC "possesses authority to impose retroactive refunds for § 205 violations," Pet. App. at 18a, and relied on a line of cases involving the imposition of refunds or other monetary relief as a remedy for Section 205 violations.[12]

---

[11] All of the petitioners except Portland General Electric Company and AES Placerita, Inc. joined in the request for rehearing in the Ninth Circuit.

[12] Petitioners also mistakenly rely on the court's statement that a market-based rate tariff is permitted only "[i]f, on the other hand, we view the reporting requirements as integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable, and discriminatory rates. . . ." Petition at 23 n.39 (quoting Pet. App. at 16a). That language refers not to the source of FERC's power to remedy Section 205 violations, Pet. App. at 14a-15a, 18a, but to the court's concerns about FERC's procedures for *initially* reviewing the reasonableness of rates in the market-based rate scheme. *See* Pet. App. at 18a

(Continued on following page)

In sum, as petitioners themselves argued on rehearing in the Ninth Circuit, the opinion holds that an unreported rate "lacks filed rate protection," and there is nothing in the law that precludes FERC from order retroactive refunds in such circumstances.

B. Petitioners Did Not Properly File Their Rates Under Any Theory; Therefore, The Judgment Is Valid Regardless of the Reasons Given By The Ninth Circuit.

The petition hinges on an assumption that market-based rate tariffs produce valid filed rates. Public utilities have no "contractual reliance interests," Petition at 2, in rates they failed to properly file with FERC. *E.g., Security Services*, 511 U.S. at 440-43. Similarly, if petitioners did not properly file their rates, there is no possibility that FERC could "impose retroactive refunds not contemplated by Congress," Petition at 2, because the filed rate doctrine only bars retroactive refunds on "properly filed" rates.

(holding that FPA Section 205(e) fails to operate in the scheme "as FERC would have us interpret it"); *supra* at 11.

In order to avoid an interpretation that would cut Section 205(e) out of the scheme entirely, the court held that FERC must provide "substitute" procedures and remedies for the public to obtain an *initial* review of the reasonableness of rates, i.e., a review that occurs outside the confines of a proceeding under FPA Section 206. Pet. App. at 16a. Petitioners argue that any such "substitute" procedures would violate the FPA, but the issue is not properly presented here.

The Ninth Circuit had no occasion to address the particulars of any "substitute" procedures and remedies for initially reviewing rates charged in the market because, due to widespread reporting violations, petitioners and other sellers only complied with one-half of the "dual requirement" for filing their market-based rates. As a result, there was effectively "no filed tariff in place at all" that could be challenged under such "substitute" procedures.

E.g., Arkla, 453 U.S. at 577. In this case, however, rates were not properly filed under *any* theory. The plain wording and legislative history of the FPA, as well as numerous decisions of this Court and the Court of Appeals for the District of Columbia, leave no room for doubt about that. This provides an alternate ground to support the judgment, obviating any need for further review by this Court.

As discussed in more detail in the conditional cross-petition ("cross-petition") filed by the California Attorney General,[13] a tariff which states only that rates will be determined "by agreement," and contains no ascertainable rates, violates the statutory requirement that utilities file schedules "showing all rates and charges for any transmission or sale subject to the jurisdiction of [FERC]." 16 U.S.C. § 824d(c)-(d); *see Electrical Dist. No. 1. v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (Scalia, J.); *Southwestern Bell Corp. v. FCC,* 43 F.3d 1515, 1519-21 (D.C. Cir. 1995); *Regular Common Carrier Conference v. United States,* 793 F.2d 376, 379-80 (D.C. Cir. 1986) (Scalia, J.).[14]

FERC's prior determinations that petitioners and others could not exercise market power, *see* Petition at 18, does not cast any doubt on the validity of the judgment. This Court has held on two previous occasions that the existence of competition does not justify reliance on unfiled, privately negotiated rates. *MCI*, 512 U.S. at 230-31; *Maislin*, 497 U.S. at 132; *see also Southwestern Bell*, 43

---

[13] In order to avoid unnecessary duplication, the California Attorney General hereby incorporates by reference pages 4-12 of the cross-petition and summarizes the key points here.

[14] *See* Richard Stavros, *Lost in Translation*, PUBLIC UTILITIES FORTNIGHTLY, June 1, 2004, at 4 (the California Attorney General "argues a valid point: that there really is no 'filed rate' ").

F.3d at 1520 (holding that a common carrier's inability to exercise market power is "ultimately irrelevant" to a tariff's validity).

Nor does FERC's authority to prescribe the timing of rate filings, 16 U.S.C. § 824d(c), convert petitioners' market-based rate tariffs to valid filed rates, on the theory that post-transaction reporting "completes" the filing. If rates could be publicized after-the-fact, the public would have no means of challenging any given rate *before* it takes effect under Section 205(e). 16 U.S.C. § 824d(d)-(e). Such a scheme cannot be reconciled with the text, structure, or legislative history of the FPA. *See MCI*, 512 U.S. at 230-31; *Maislin*, 497 U.S. at 132.

Because sellers did not properly file their rates as a matter of law, the Ninth Circuit's remand would still be valid, even accepting for the sake of argument petitioners' interpretation of the holding. The Ninth Circuit ordered FERC to reinstate the California Attorney General's request for refunds. Pet. App. at 2a. That is the appropriate disposition of the case regardless of the reasons given by the court.

C. Petitioners Fail To Show Any Exigency Requiring Intervention By This Court.

Petitioners argue heatedly that the Ninth Circuit's decision will stifle the "growth and competitiveness of the nation's power markets," Petition at 27, and "wreak havoc" on FERC's ability to conclude various regulatory proceedings relating to the energy crisis. *Id.* at 29. *Lockyer* was decided more than two years ago, however, and none of these threats has materialized. And petitioners provide no evidence that the future bodes any differently.

1. Petitioners argue that FERC has embraced the Ninth Circuit's supposed "aggrandizement of [its] power," and that FERC plans to "extend the destabilizing effects of the Ninth Circuit's pernicious reading of the FPA to other parts of the country. . . ." Petition at 27. But petitioners cite no cases in which FERC has signaled such an intent, or even a single case in which FERC has interpreted the holding in *Lockyer* to mean that FERC has a generalized grant of authority under Section 205 to order retroactive refunds on properly filed rates.

Petitioners cite a statement by FERC's former chairman, who expressed his belief that the Ninth Circuit provided the Commission "broader refund authority" than it thought it had. *Id.* at 26. But there is nothing nefarious about that. FERC simply ruled it had no authority to order refunds under the circumstances of this case, and the Ninth Circuit reversed.

Petitioners also argue that another panel of the Ninth Circuit has "extended" the holding in this case in a way that makes it impossible for public utilities to invoke the *Mobile-Sierra* doctrine. Petition at 29. In fact, the decisions cited by petitioners expressly leave it up to FERC to determine the appropriate standard of review on remand, *i.e.*, to decide whether the *Mobile-Sierra* standard should apply or not. *Pub. Util. Dist. No. 1 v. FERC*, Nos. 03-72511 et al., 2006 WL 3717533, at *34 (9th Cir. Dec. 19, 2006); *Pub. Util. Comm'n v. FERC*, Nos. 03-74207 & 03-74246, 2006 WL 3717673, at *7 (9th Cir. Dec. 19, 2006).

2. Petitioners claim that *Lockyer* will "likely have a chilling effect on future investment," Petition at 28, but they provide no evidence of any such effect traced to the decision, which was issued more than two years ago. (Of

course, a variety of complex factors influence the investment climate in wholesale power markets.)

As petitioners point out, FERC reported to Congress on the need to "restor[e] confidence in California markets. . . ." Petition at 28. But the same report cites the *Lockyer* decision (in a footnote) without suggesting in any way that it poses a threat to future investment by gutting the filed rate doctrine, as petitioners claim. FERC, Report to Congress, dated Dec. 27, 2005, p. 14.[15]

3. Finally, petitioners' claim that the *Lockyer* decision will hamstring FERC's ability to conclude various regulatory proceedings is spurious. Petition at 29. Numerous energy crisis settlements have been executed and approved by FERC since the *Lockyer* decision was issued.[16]

---

[15] California has gained considerable amounts of new generating capacity since *Lockyer* was decided, and the California Energy Commission ("CEC") has either approved, or is considering, applications to construct thousands of additional megawatts of capacity. According to the CEC, generators brought a total of 4,597 megawatts ("MW") of new capacity "on line" in California in 2005 and 2006 – an average of 2,299 MW. By comparison, from 2001-2004, the period preceding *Lockyer*, the state gained an average of 2,134 MW per year. *See* California Energy Commission, *Energy Facility Status*, updated Jan. 8, 2007 (accessible on the Internet at www.energy.ca.gov/sitingcases/all_projects.html#approved).

[16] *San Diego Gas & Elec. Co.*, 115 FERC ¶ 61,230 (settlement with IDACORP), *rehearing denied*, 117 FERC ¶ 61,020 (2006), petition for review pending *sub nom. Port of Seattle v. FERC*, No. 06-75044 (9th Cir. Oct. 25, 2006); *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,308 (2005) (settlement with Reliant Energy, Inc. et al.), *rehearing denied*, 115 ¶ 61,271 (2006), *petition for review pending sub nom. Port of Seattle v. FERC*, No. 06-72957 (9th Cir. June 7, 2006); *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,235 (2005) (settlement with Public Service Co. of Colorado); *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,171 (2005) (settlement with Enron Power Marketing, Inc. et al.), *rehearing denied*, 115 FERC ¶ 61,032 (2006), *petition for review pending Port of Seattle v. FERC*, No. 06-72649 (9th Cir. May 23, 2006); *San Diego Gas & Elec.*

(Continued on following page)

Combined, these settlements cover roughly half of all the sales that occurred in California during the energy crisis and are worth billions of dollars.

California and other refund claimants recently submitted an additional settlement to FERC for its approval,[17] several more settlements will be filed shortly, and negotiations are active and ongoing with a number of other sellers.[18] Petitioners' claims about *Lockyer*'s purported impact on FERC's exercise of its regulatory responsibilities do not withstand scrutiny.

In sum, petitioners have failed to show that *Lockyer* has caused, or will cause, any adverse commercial or regulatory consequences. The Ninth Circuit's decision may be a critical one for the petitioners, who are still embroiled in several cases arising out of the energy crisis and are hoping this Court will provide them additional leverage at the bargaining table with California by granting review. But it is not a critical one for the nation's power supply.

Co., 111 FERC ¶ 61,017 (settlement with Mirant Corp. et al.), *rehearing denied*, 111 FERC ¶ 61,354 (2006); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (settlement with Duke Energy North America Corp., et al.), *rehearing denied*, 111 FERC ¶ 61,186 (2006).

[17] *Joint Offer of Settlement*, FERC Docket No. EL00-95-000 et al., filed Aug. 9, 2006 (proposed settlement with Eugene Water & Electric Board).

[18] *See* Letter from Lisa J. Evans, Mediator, Ninth Circuit Court of Appeals, dated Jan. 25, 2007 (expressing pleasure that "several settlements have been reached during the settlement 'time out'" ordered by the court, and noting that these settlements "will be filed with FERC in the near future").

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 5, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State
of California
TOM GREENE
Chief Assistant Attorney General
MANUEL MEDEIROS
State Solicitor General
MARK BRECKLER
Senior Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
KENNETH P. ALEX
Supervising Deputy Attorney General
PAUL STEIN
Deputy Attorney General
(Counsel of Record)
Counsel for Respondent
State of California ex rel.
Edmund G. Brown Jr.,
Attorney General